UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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| Fair Isaac Corporation, a Delaware corporation,<br><br>Plaintiff,<br><br>v.<br><br>Federal Insurance Company, an Indiana corporation; and ACE American Insurance Company, a Pennsylvania corporation,<br><br>Defendants. | ) | File No. 16-cv-1054 (WMW/DTS)<br><br>Courtroom 9E<br>Minneapolis, Minnesota<br>Monday, August 26, 2019<br>3:02 p.m. |

BEFORE THE HONORABLE DAVID T. SCHULTZ
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE
**(COURT'S RULING ON ECF NO. 456)**

APPEARANCES

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| For the Plaintiff:<br>(By telephone) | MERCHANT & GOULD P.C.<br>BY: ALLEN W. HINDERAKER, ESQ.<br>HEATHER KLIEBENSTEIN, ESQ.<br>JOSEPH DUBIS, ESQ.<br>150 South Fifth Street, #2200<br>Minneapolis, Minnesota 55402 |
| For the Defendants:<br>(By telephone) | FREDRIKSON & BYRON P.A.<br>BY: LEAH JANUS, ESQ.<br>TERRENCE J. FLEMING, ESQ.<br>200 South Sixth Street, #4000<br>Minneapolis, Minnesota 55402 |
| Court Reporter: | RENEE A. ROGGE, RMR-CRR<br>1005 United States Courthouse<br>300 South Fourth Street<br>Minneapolis, Minnesota 55415 |

Proceedings recorded by mechanical stenography; transcript produced by computer.

**P R O C E E D I N G S**

**IN OPEN COURT**

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THE COURT: So we are on the record in the matter of Fair Isaac versus Federal Insurance Company, et al., Civil No. 16-1054.

Will counsel for Fair Isaac note your appearance for the record, please?

MR. HINDERAKER: Your Honor, Allen Hinderaker, Heather Kliebenstein and Joe Dubis from Merchant & Gould.

THE COURT: Good afternoon to the three of you.

Counsel for Federal Insurance?

MS. JANUS: Your Honor, Leah Janus and Terry Fleming from Fredrikson.

THE COURT: All right. Good afternoon to the two of you.

All right. I have given the matter a lot of careful consideration, and I am going to permit the amendment, but with some additional constraints, which I will explain at the end of this.

My rationale I will put on the record so that if either of you choose to appeal it to Judge Wright, you will have the benefit of at least understanding why I am ruling the way I rule, and she can have a good look at it.

First of all, the party seeking amendment,

particularly one late in the process that would require a change to the Rule 16 scheduling order, must show good cause for that amendment.

I am finding here that Federal had good cause for the amendment because they did not fully appreciate the need to plead the statute of limitations. And there is a couple of circumstances that I find may have explained or may explain the failure to fully appreciate the relevance of or the need to plead the statute of limitations.

First, even though Mr. Fleming did not argue it, I think one could read the initial complaint in such a way as to construe it or understand it that the infringement and the breach were keyed off the merger date of January 15, 2016, given that the original complaint was filed just a week more than three months after that date. It would be understandable that someone reading the complaint that way would have no reason to raise the statute of limitations.

Now, I will grant Mr. Hinderaker's point that indeed the original complaint, and the two amended complaints, can also be read not to plead infringement or breach strictly related to the merger date, but I do believe the complaint can be read in some fashion reasonably either way. And even though Mr. Fleming did not bring it up, the court takes notice of the fact that Mr. Fleming was not the original lead lawyer on the matter.

More importantly, I have closely read each and every one of the complaints, and none of them refer to installation of the software. They refer primarily to use and access, but also disclosure and reproduction to third parties. There's nothing wrong with that pleading, and I'm not suggesting there is; however, they may not fully convey full appreciation of claims going back to the initial installation as "the triggering event" that both of the parties have referred to.

So all of these phrases could be interpreted to refer either to continued use, which may well mean that the statute of limitations doesn't cut off the action so much as it just defines the period for damages, or could be read -- and/or could be read to refer to post-merger activities. In any event, the complaints themselves don't indicate that installation of the software itself had some independent legal significance.

So over the course of discovery I am persuaded that there is some ambiguity in or at least divergence between the parties as to how to understand the testimony and the discovery responses that says installation is use. Both sides have a plausible interpretation of that testimony such that the defendant could misunderstand, misperceive or simply fail to perceive the need to plead the statute of limitations initially.

I will note one other observation in this regard. What Federal didn't do in its answer to the first amended complaint and then its answer to the second amended complaint is that it didn't just throw in the boilerplate affirmative defense that plaintiff's claims are barred in whole or in part by the applicable statute of limitations. Many, many lawyers do that, whether or not there's really any basis for considering the statute of limitations. And Federal -- you know, the courts routinely encourage parties, and in fact that is the requirement of Rule 11, not to simply plead boilerplate affirmative defenses for which there is no basis. And Federal should not certainly be penalized for not having thrown a boilerplate defense in in the circumstances of this particular case.

So on the issue of good cause, I find that there is sufficient good cause to allow the amendment and that there was no lack of due diligence in that form by Federal.

The second factor that is often considered is the undue delay or the lack of due diligence. I've already addressed that in part, but there is also the due diligence that relates to the time period between discovery of the need to amend the pleadings and the amended pleadings.

In this circumstance Federal has persuaded me that they didn't fully appreciate the need to plead the statute of limitations until they had fully read and absorbed the

summary judgment briefing filed by FICO on July 26th of 2019. Federal then filed its motion to amend 13 days later on August 8 of 2019. So there is no undue delay in bringing the matter to the court's attention.

Now, let me turn to the third factor, prejudice to the opposing party. And the first point to be made is that prejudice to the opposing party is not that they might lose some portion of their damages claim or that their claim is not viable because of the statute of limitations. That's not prejudice. That's -- or at least it's not the kind of prejudice that Rules 15 and 16 address. That's deciding the case on the merits. And courts have long indicated a strong preference for deciding cases on their merits. If the claim or an aspect of the claim is barred by the statute of limitations, then the claim simply shouldn't proceed.

Now, prejudice would exist and may exist if FICO has been prevented or deterred from taking adequate discovery necessary to meet this affirmative defense. There has been a 30(b)(6) deponent whose topics included dates of installation of all software. Federal has represented to this court that any and all installations of the software, whatever version, at issue in this lawsuit have been disclosed to the plaintiff. However, FICO doesn't need to take Federal at its word on that. And so I am ordering two items that Federal must do to ameliorate any potential

prejudice to FICO.

Number one -- and this is all keyed off, as I understand it, Judge Wright's new hearing date, which is December 4 of 2019. So, number one, on or before November 15th, 2019, Federal shall disclose in writing all installations of all versions of the FICO software that is the subject of this lawsuit where those installations occurred outside the United States.

Number two, on or before November 27th Federal will produce in Minneapolis a properly prepared 30(b)(6) witness to testify regarding any of those installations disclosed on or before November 15th relating to any version of the software at issue in this lawsuit where that installation occurred outside the United States.

I have two other comments that form part of the court's rationale or approach to this issue. Number one I've already alluded to and that is the court has a very strong preference to have cases decided on the merits of the lawsuit.

Number two, this court in particular does not countenance games of gotcha. And if I were persuaded, for example, that FICO deliberately pleaded its claims in such a way as to obfuscate the nature of those claims, then it would have been an easy decision with respect to permitting the amendment. If I were convinced that Federal ginned up

this entire scenario as a way of avoiding providing discovery to FICO on installations occurring outside the United States so as to prejudice FICO in a way that didn't allow it to fully meet this defense of the statute of limitations, I would have no trouble denying the amendment. Both of those things I am not persuaded of. Both of those things would be an incredibly reckless and dangerous way to proceed.

So I'm not persuaded that anybody is engaged in a game of gotcha, and I am going to let the amendment go forward, but with the two things I have ordered, so as to ameliorate any prejudice if there is any to the extent possible.

All right. That's my ruling. The ruling is on the record in open court with a court reporter present, so the 14-day period for objecting to the order begins to run from today. If either of you choose to appeal it, you should contact Renee Rogge, who is the court reporter, and order a transcript of this ruling.

Let me pause there. Mr. Hinderaker, Ms. Kliebenstein, any questions or points of clarification that need be made with respect to what the court has ruled?

MR. HINDERAKER: Your Honor, I do have a question or perhaps it's a clarification.

With respect to that first condition by

November 15, 2019, in writing all installations of all versions installed outside of the United States, is the way I took -- my notes took your comments and your ruling down. And the clarification is, I presume that this written disclosure would include the dates of each of those installations?

THE COURT: Yes, the dates and locations of each installation.

MR. HINDERAKER: Thank you. And then -- and then the other matter that I'd like to raise is when we were in court Mr. Fleming -- my takeaway from Mr. Fleming's comments was that while the time for summary judgment motions was last July 26th, there was the notion I heard in court that the defense's summary judgment would be raised by the defendants in their responsive briefs, their responsive brief to FICO's summary judgment motion, which are due -- which are due today. You know, that would be, obviously, that would be new matter in a responsive brief, but, in addition to that, what I would view as an impropriety. With the court's order, any raising of that statute of limitations defense at this point before the written disclosures and before the 30(b)(6) deposition obviously would put FICO in the position of being absent the facts, absent the full facts in which to respond.

So I guess I'm asking for the court's guidance

that it would be -- that -- the court's guidance to the effect that -- that Federal is not procedurally in a position at this stage to raise the statute of limitations on a motion for summary judgment, given that the time for those motions has passed, and the parties should address whatever follows from the discovery after that discovery is completed in late November of 2019.

THE COURT: Those are all eminently fair comments. Here is what I was envisioning on this. Number one, to the extent that Federal raising the statute of limitations is procedurally improper under Rule 56 or other rule, my viewpoint is that is for Judge Wright to decide. As I had understood Federal's position, they were raising it, they were going to raise it regardless of my ruling. And my intent was to the extent that the failure to plead it was a bar to Federal's proceeding, I was going to allow it to be pleaded. But whether or not they have appropriately briefed it or whether it is too late to raise it on summary judgment are not before me, and I think those are properly directed to Judge Wright. And my ruling does not foreclose such arguments.

On the sequencing of discovery and the issues it presents, I was approaching it from an admittedly pragmatic standpoint, which was Federal can raise whatever it's going to raise, FICO can respond however it chooses to respond,

but my sequencing of November 15 and November 27 were intended to give FICO the benefit of full discovery prior to the oral argument on the summary judgment motion such that FICO could address it and could also in light of this order ask for whatever briefing or other timing relief that it could obtain from Judge Wright. So that was my thinking on that.

Have I responded to your questions, Mr. Hinderaker?

MR. HINDERAKER: Yes, you have. Thank you, Your Honor.

THE COURT: Okay. Thank you.

Mr. Fleming, Ms. Janus, any clarifications or questions?

MS. JANUS: No, Your Honor. Thank you.

THE COURT: Okay. So be it. That is the order. You are all invited to proceed however you see fit, but in the meantime court is in recess. Thank you.

(Court adjourned at 3:25 p.m., 08-26-2019.)

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I, Renee A. Rogge, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Certified by: /s/Renee A. Rogge
Renee A. Rogge, RMR-CRR